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Milblogging: The Military’s Attempt to Regulate Service Members’ Speech Rights

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Milblogging: The Military’s Attempt to Regulate Service Members’ Speech Rights

ABSTRACT: This paper argues that the Supreme Court should adopt a strict scrutiny standard of review when weighing the military’s right to regulate service member speech via online blogging so long as it does not violate classified information and family notification standards. The military also should update vague and outdated articles of the Uniform Code of Military Justice to specifically address blogging.

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   A. Introduction

The United States military is presently facing a variety of challenges when dealing with service members’ speech and security threats. Many service members post web logs that focus on personal experiences obtained while in the military (“milblogs”) from the front lines of the global war on terror, accessible to anyone with an internet connection. There is a growing sentiment that these blogs pose a security risk. These blogs could be seen as another way the

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United States is exposed to heightened homeland security risks.\(^2\) Blogs have become a unique challenge because of the characteristics of blogging, instantaneous delivery and wide reaching dissemination, differentiate it from traditional mail’s limitations, length of delivery and specific recipient. The possible revealing of non-classified information, but important information nonetheless, amplifies the challenges of balancing First Amendment speech rights.

The First Amendment states “Congress shall make no law… abridging the freedom of speech, or of the press.”\(^3\) What exactly does this mean for service members in the military? Currently, service members in the United States military have their First Amendment rights subjugated as a facet of their service. This is a factor of service that the American public and the Supreme Court are willing to accept, but how far does this subjugation of rights go? Under the Supreme Court’s First Amendment jurisprudence the military is not required to support debate or endure protest so far as such tolerance is required for civilians.\(^4\) Rather, to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.\(^5\) There is currently a struggle between the military regulating speech and service members attempting to exercise that speech.

The military is subject to the Bill of Rights and its Constitutional implications.\(^6\) Though the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission

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\(^3\) U.S. CONST. amend I.


\(^5\) Id.

\(^6\) Crawford v. Cushman, 531 F.2d 1114, 1120-22 (2d Cir. 1976) (stating the military is subject to the Bill of Rights).
requires a different application of those protections.\textsuperscript{7} Where should the balance between national security and service members’ free speech rights lie when dealing with service members’ blogs?

In a post-September 11th world, the government has become more active in restricting Americans’ civil liberties, especially their First Amendment rights.\textsuperscript{8} This is no different in the military realm. The government has implemented regulations that limit service members’ First Amendment speech rights.\textsuperscript{9} In order to stop leaks of what the Department of Defense sees as information helpful to the enemy, it has promulgated regulations requiring milbloggers to register blogs with commanders, limiting what milbloggers can post on their sites, and punishing authors who leak sensitive information.\textsuperscript{10}

The first part of this paper examines the background of the military blog and military regulations dealing with free speech. It also addresses the Department of Defense’s authority to promulgate milblogging regulations and introduces the current regulations. The second part conducts an analysis into the current military approach to regulating service member blogs. It also argues that the military should adopt a new standard for administrative regulation under the Uniform Code of Military Justice (“UCMJ”). It argues that milblogs serve important societal interests and that courts’ traditional justification for a different standard of First Amendment review in the military does not apply to milblogs. The Supreme Court should adopt a strict scrutiny standard of review when weighing the military’s right to regulate service member speech via online blogging so long as it does not violate classified information and family

\textsuperscript{7} \textit{Parker v. Levy}, 417 U.S. 733, 758 (1974) (military necessity requires a different freedom of speech analysis by giving the military deference when limiting speech).


\textsuperscript{10} \textit{Id.}
notification standards. The military also should update vague and outdated articles of the UCMJ
to specifically address blogging.

B. Background

I. Blogging on the Internet

A. A Brief Description of a Blog

A blog (a contraction for web log) is a website that contains an online personal journal
with reflections, comments, and often hyperlinks given by the writer.\textsuperscript{11} Typically a blog contains
regular entries of commentary, descriptions of events, or other material such as graphics or
video. Entries are commonly displayed in reverse chronological order. “Blog” can also be used
as a verb, meaning to maintain or add content to a blog.\textsuperscript{12}

Many blogs give commentary or news on a particular subject while others function as
personal online diaries.\textsuperscript{13} A typical blog combines text, images, and links to other blogs, web
pages, and other media related to its topic. The ability for readers to leave comments in an
interactive format is an important part of many blogs. Most blogs are primarily textual, although
some focus on photographs (photoblog), videos (vlog), or audio (podcasting), which are part of a
wider network of social media.\textsuperscript{14} When military service members write a blog, it is often called
a “milblog.”\textsuperscript{15} With the advent of video blogging, the word “blog” has taken on an even looser
meaning. A blog can be any bit of media where the subject expresses an opinion or simply talks
about something.

\textsuperscript{12} Id.
\textsuperscript{13} See, e.g., Milblogging.com, http://www.milblogging.com/ (examples of different types of blogs).
\textsuperscript{14} Id.
\textsuperscript{15} Robbins, supra note 1, at 1.
B. The Rise of the Milblog

Since 9-11, milblogs have become more mainstream.\textsuperscript{16} Milblogs developed and expanded their content to address wartime issues as well as various political issues.\textsuperscript{17} Some milbloggers choose to identify themselves on their websites, while other authors remain anonymous, known only by a pen name.\textsuperscript{18} A blogger can log on via public computer, access a website, and blog with total anonymity. The author can then update that blog from any computer with internet access. Whether anonymous or not, “[s]oldier bloggers encompass most ranks, jobs and locations.”\textsuperscript{19} These service members are “writing from Iraqi Internet cafes, barracks and anywhere else a service member can log on to the Web.”\textsuperscript{20} “Some of their writings “feature practical news, photographs, and advice.” Other milblogs “are openly political, while some question the war and some cheer it.”\textsuperscript{21} Service members can quickly upload images and videos from their personal cameras gathered while on patrol within minutes of returning to base.\textsuperscript{22}

Service members use online blogs because they are an effective and efficient way to communicate with friends and family. “Soldiers and their families now expect near instantaneous internet and voice communications as an essential quality-of-life element.”\textsuperscript{23} Major Elizabeth Robbins, in her Army award winning essay on blogs, noted that blogs allow service members to communicate quickly by letting them post one blog to let loved ones know

\textsuperscript{17} \textit{Id.} at 47.
\textsuperscript{18} \textit{See generally} Milblogging.com, \url{http://www.milblogging.com} (for anonymous and non-anonymous milblogs).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 406-07.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} Robbins, \textit{supra} note 1, at 1.
the current condition they were in as opposed to writing multiple emails. 24 Due to the nature of the deployed environment, service members almost exclusively use web-hosted email services. These email services all have memory limitations that allow only a certain amount of emails to be received without being deleted from the inbox. 25 For service members in a high operational tempo it is difficult to check email regularly. Blogs almost universally allow unlimited “comments” to be posted in response to a blog. 26 This allows families to leave messages that are not automatically cleaned out of a limited space web-based email service. Furthermore, the process of posting pictures within a blog is rarely a problem. For web-hosted email service, pictures are often too large to send more than a few in an email.

Blogging also allows service members to share their own experiences and advice. 27 Service members also have themselves become, and understand that the public has become, increasingly distrustful of mainstream news. They are hungry to relay their own service member experience to civilians, and milblogs are a way to directly tell their story. 28 Milblogs seize back some of the media’s power, and many service members relish the opportunity to share their own experiences of daily life in a warzone. 29 Instead of depending on the media to relate stories to families back home, similar to what happened in Vietnam, service members now can put their story up within moments of an event occurring without depending on the media for coverage. 30

24 Id. at 3-4.
25 See e.g. Army Knowledge Online, https://www.us.army.mil (example of a popular web hosted email service).
26 See e.g. Milblogging.com, http://www.milblogging.com/ (examples of blogs and comments).
27 Robbins, supra note 1, at 2.
29 Robbins, supra note 1, at 2.
Milblogs also satisfy service members’ need for an outlet to voice their feelings.\(^{31}\) The concept that service members keep diaries or write letters home is not new.\(^{32}\) However, many modern service members prefer the electronic forums that can be simultaneously anonymous and public.\(^{33}\) Certain blog sites allow complete anonymous posting requiring only a user name, working email address which can be signed up for anonymously,\(^{34}\) and password. These are usually not verified and can be completely fictitious.\(^{35}\) Those who want interaction create milblogs that let someone viewing the milblog leave messages.\(^{36}\) There are people who try to use the milblogs as an online forum where they can share lessons learned from experiences.\(^{37}\) Troops who are heading into a combat zone routinely read the milblogs of those who have already deployed in order to be better prepared.\(^{38}\)

C. “The War Tapes” & Blogging

Service members’ have expanded methods of delivering their speech beyond what most people would have imagined. If blogs could be viewed as diaries or letters home, then it seems hard to find the category to describe the film “The War Tapes.” The War Tapes’ official website describes it as follows:

In March 2004, just as the insurgent movement strengthened, several members of one National Guard unit arrived in Iraq, with cameras. THE WAR TAPES is the result – a uniquely collaborative film from a team that includes Director Deborah Scranton, Producer Robert May (THE FOG OF WAR) and Producer/Editor Steve James (HOOP DREAMS).

Straight from the front lines in Iraq, THE WAR TAPES is the first war movie filmed by soldiers themselves. It is Operation Iraqi Freedom as filmed by

\(^{31}\) Robbins, supra note 1, at 4.
\(^{32}\) See, e.g., American Civil War Collection at Electronic Text Center, http://etext.virginia.edu/civilwar/ (examples of soldier diaries and letters home).
\(^{33}\) See supra note 26.
\(^{34}\) See, e.g. Yahoo mail, http://mail.yahoo.com (signing up for an anonymous email address).
\(^{35}\) See, e.g. The Blogspot, http://www.blogspot.com (example of a blog site that allows anonymous sign up).
\(^{36}\) See supra note 26.
\(^{38}\) Robbins, supra note 1, at 4.
Sergeant Steve Pink, Sergeant Zack Bazzi and Specialist Mike Moriarty and other soldiers…

While they battled unconventional forces, they recorded events that conventional journalists have been unable to capture. They mounted tripods on gun turrets, inside dashboards and used POV mounts on their Kevlar helmets and vests. They filmed all of the footage in Iraq, which amounted to over 800 hours of tape…

In the end, THE WAR TAPES is a complex, heartbreaking, and completely unique opportunity for millions to witness first-person experiences of war—a modern-day *Odyssey*—and the experience of homecoming.\(^{39}\)

The military took a chance by allowing such a film to be made.\(^{40}\) The New Hampshire National Guard may have believed there were benefits to access and that allowing the film to be made would highlight the positive aspects of the unit. Perhaps, this National Guard believed personal stories would reveal a side of the military and the war few people considered. Allowing service members to share personal stories adds a level of credibility that an embedded reporter could not achieve.

“The War Tapes” adds to one argument for increasing service members’ speech rights to blog. Allowing service members to express unfiltered and uncensored does not automatically cause a security problem. The film is similar to blogs in that it is service members’ personal stories told directly by them. Blogs have an ability to be accessed worldwide by friend or foe, American or foreigner, which adds to the possibility of a security threat.\(^{41}\) An interesting idea to note is that the film could be seen as a video diary, as most participants first thought of themselves as “cameramen” but then viewed it as a diary.\(^{42}\) Should service members be allowed to create something similar and post it on a personal blog? The military would not have the ability to censor the footage, much the same way that the film’s director did not give the military...

\(^{39}\) The War Tapes (SenArt Films 2006), http://thewartapes.com/about/.


\(^{42}\) Supra The War Tapes
Beyond that, the military believes that allowing service members to blog free from excessive regulations would allow a divisive sentiment to spread amongst the units.\textsuperscript{44} “The War Tapes” is an example of a large amount of access not resulting in the degradation of the unit.\textsuperscript{45}

D. The Tactical Problem with Milblogs

The basic problem with milblogs is that service members may publish anonymous, real-time information about the military without its knowledge.\textsuperscript{46} This raises concerns such as: 1) Who speaks for the Army?; 2) If everyone may speak, what is the impact?; and 3) What controls, if any, should the military impose on service members? There are current guidelines for printed books and articles, but most service members fail to comply with the requirement to consult a Public Affairs Officer if they wish to publish military content or to use their military affiliation.\textsuperscript{47} These Officers usually require the addition of a codicil, such as: “This work does not reflect the views of the Department of the Army. The views here are his own,” to anything the service member may distribute.\textsuperscript{48} This is an appropriate step that military could apply to all milblogs by updating the UCMJ.

Many leaders believe that milblogs may spread information that is damaging to unit morale, disseminates gripes and hearsay, or helps enemies in assessing unit morale and other intangibles.\textsuperscript{49} However, many leaders also believe that these damaging sentiments would exist

\textsuperscript{43} Supra Press Notes.
\textsuperscript{44} Goldman, 475 U.S. at 507 (outlining the military’s need to limit speech).
\textsuperscript{46} Robbins, \textit{supra} note 1, at 12.
\textsuperscript{48} Robbins, \textit{supra} note 1, at 12.
\textsuperscript{49} Telephone Interview with CPT Brandon Stankewicz, Brigade Assistant Operations Officer, 2/1 Infantry Division (Oct. 6, 2008) (notes on file with author).
whether or not the milblog forums existed.\textsuperscript{50} Milblogs may reveal embarrassing unmet needs for the unit, command prejudices, and up-to-date lessons learned. What is perceived as bad news may not actually be bad. If a unit is having difficulties, blogs represent alternative means of communication with outside assistance.\textsuperscript{51} Often, family members or people with outside resources can see a problem and respond much more efficiently than the military. Examples include lack of body armor, sub-standard vehicle armor, and eye protection. Blogs home allowed family members to become proactive in contacting their legislative representatives. Rather than go through traditional funding channels and requests, public pressure and sentiment aided the military in obtaining these items rapidly.\textsuperscript{52} This takes a more personal form in the quality-of-life items.\textsuperscript{53} Units that are having trouble getting items to make life in the warzone more comfortable often seek donations from communities back home. These items usually arrive within a week, whether the items are gym equipment, snacks, or toiletries.\textsuperscript{54}

E. The Military’s Offensive Approach to Blogs

The Department of Defense has begun to respond much more broadly to service member blogging rather than allowing the individual services to handle individual cases. Leo Shane reported for the \textit{Stars and Stripes} that:

\begin{quote}
Since July [2006] a new 10-man branch of the Virginia Army National Guard’s Data Processing Unit — a team of guardsmen trained in security issues — has been surveying the Internet for the Army, looking for online postings that might violate operational security standards.

The group… is looking at blogs and photo-sharing sites like myspace.com.
\end{quote}

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} Telephone Interview with CPT Christopher Whittle, Battalion Support Platoon Leader, 1-18 Infantry (Oct. 15, 2008) (notes on file with author).
\textsuperscript{53} Whittle, \textit{supra} note 51.
\textsuperscript{54} \textit{Id.}
Last year Army officials issued warnings to all soldiers posting information online, noting that certain mission information, photographs of defense facilities, and other unclassified information could pose a threat to soldiers serving overseas.\textsuperscript{55} The military is no longer just dealing with individual cases like Buzzell and Clark’s, but is actively looking for operational security violations, rather than waiting until they are reported to the chain of command.\textsuperscript{56} The individual branches of service also have started to enforce separate policies requiring service members to register their blogs. Service members who fail to do so are subject to UCMJ punishment.\textsuperscript{57} Yet, there is an inevitable problem that will arise following this course. Each branch will more than likely have different standards in place. So a member of the Air Force and a member of the Army living next to each other in Iraq may be subject to different standards for blogging from the same computer. Further, what the military fails to account for is the difficulty in being able to identify anonymous authors of milblogs. Service members who do not register blogs could essentially escape punishment by blogging anonymously through the process outlined above. These individual regulations and orders by commanders are further addressed in detail in the Military Regulations section of this paper.

F. Service Members’ Punishment for Blogging

As milblogs have become more prominent, so has the military’s attention to them. In fact, the Department of Defense has enforced regulations by “targeting bloggers with warnings, punctuated by high-profile disciplinary action.”\textsuperscript{58} The military has gone as far as assembling a group of Virginia National Guardsmen who monitor the internet for American service members


\textsuperscript{56} Id.

\textsuperscript{57} Multi-National Corps-Iraq Policy #9, supra note 9.

\textsuperscript{58} Mallia, supra note 41.
security violations.\textsuperscript{59} Obviously, service members may be penalized for blogging if the blog contains information the military deems classified. The common practice is for the service member’s command to demote and fine the service member for unauthorized release of military information in the form of non-judicial UCMJ punishment.\textsuperscript{60} An example is Arizona National Guardsmen Leonard Clark. Clark was demoted and fined $1,640 in August, 2005, by the Army for posting on his blog information that the Army deemed classified as defined by his commander.\textsuperscript{61} Specifically, the Army alleged Clark was posting information about troop movements.\textsuperscript{62} Clark maintains his blog was simply critical of the war.\textsuperscript{63} Clark’s blog and its host site, LeonardClark.com, are no longer active.\textsuperscript{64}

However, there are cases of service members being punished despite blogging about information that may seem unworthy of classification. U.S. Army Specialist Colby Buzzell, a Stryker Brigade gunner stationed in Mosul, Iraq, relayed such stories.\textsuperscript{65} “When word about Buzzell’s blog reached his battalion commander, Buzzell was ordered to clear all his blog postings with his platoon sergeant because Buzzell had come ‘dangerously close to violating operational security by mentioning that his unit had run low on water during the hours-long fire-fight and describing some of the steps he took to get more ammunition as the battle raged on.’”\textsuperscript{66} These comments would not seem to seem to fit into the Department of Defense’s general definition of what “classified” information is. The Defense Technical Information Center

\begin{footnotes}
\item[59] Shane, \textit{supra} note 55.
\item[60] Tatum H. Lytle, \textit{A soldier's blog: balancing service members' personal rights vs. national security interests}. 59,3 FED. COMM. L. J., 593, 603 (2007).
\item[61] Mallia, \textit{supra} note 41.
\item[63] Id.
\item[64] Id.
\item[66] Lytle, \textit{supra} note 60, at 603.
\end{footnotes}
defines classified as “Any information that has been determined to require protection against unauthorized disclosure to avoid harm to U.S. national security.”

The average person would likely believe that disclosing a unit was low on water would not harm U.S. national security. Specialist Buzzell noted that he received a large amount of positive responses to his blog. Also, “[p]eople with children in the military found Buzzell's blog a source of information for what their children were experiencing during their service in Iraq.”

II. Free Speech within the Military & Regulation

When service members have raised First Amendment issues, the military has historically triumphed. The right of free speech to publicly express one’s opinions to any form of media is less absolute for citizens that serve in the military than the general public. Certain speech that harms the command structure may not be constitutionally protected. Service members’ relationships to the government are not easy to define. There is often a large overlap as the military is employer, judge, jury, and community. The difficulty occurs as the military has tried to balance the interests of the service members and its own needs through regulations and judicial enforcement.

A. Clear and Present Danger Standard

National Security has trumped the right of speech since World War I. In Schenck v. United States, the Supreme Court held that Schenck’s “free speech” rights undermined

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68 Lytle, supra note 60, at 603.
69 Id. at 598.
70 Priest v. Sec’y of Navy, 570 F.2d 1013, 1017 (D.C. Cir. 1977) (stating that “[i]n the armed forces some restrictions exist for reasons that have no counterpart in the civilian community.”)
71 Id.
72 Parker, 417 U.S. at 751 (stating military communities serve much larger roles).
Congress’ right to prevent threats to national security.\textsuperscript{73} The \textit{Schenck} Court established the clear and present danger standard, which allows courts to consider whether the “words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”\textsuperscript{74} So if civilians and military members distribute material, a commander may prohibit such material if it presents a clear danger to loyalty, discipline, or morale. However, there are now wide ranges of cases where \textit{Schenck} is no longer applicable.\textsuperscript{75} The clear and present danger rule is not a bright line rule anymore, but instead depends upon specific facts of the case.\textsuperscript{76} Despite the changes over time, \textit{Schenck} remains valid in the context of military application.

A related argument emphasizes “military necessity” over free speech rights. Military necessity is the concept that because the military is a unique organization with unique demands and characteristics, it should be allowed to use internal rules to the maximum extent possible.\textsuperscript{77} This is especially true in the areas of discipline and national security. The courts must defer to the military in these regards to effectively allow them to go about administering an army capable of victory in war.\textsuperscript{78}

B. Subordination of Personal Rights for Military Personnel

Service members give up certain rights when they enter the military. Many courts support the subordination of individual rights of service members in an effort to maintain a

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\item \textsuperscript{73} \textit{Schenck v. United States}, 249 U.S. 47, 52 (1919) (expressing the clear and present danger standard).
\item \textsuperscript{74} Id.
\item \textsuperscript{75} See, e.g., \textit{American Communications Ass'n, C.I.O., v. Douds}, 339 U.S. 382, 394-95 (1950) (clear and present danger rule has been held not to be applicable to cases involving statutes regulating the conduct of labor union affairs)
\item \textsuperscript{76} \textit{Terminiello v. City of Chicago}, 337 U.S. 1, 26 (1949) (explaining the clear and present danger rule must focus on specific facts of a particular case).
\item \textsuperscript{77} \textit{Orloff v. Willoughby}, 345 U.S. 83, 94 (1953) (detailing how deference must be given to the military regarding internal regulations).
\item \textsuperscript{78} Id.
\end{itemize}
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disciplined and united military front. Courts have held “the military does not need to encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” In United States v. Priest, the United States Court of Military Appeals distinguished between the right to freedom of speech enjoyed by civilians versus military service members. The Priest Court noted that there were many issues that must be considered in military life, and that speech that could possibly weaken command is constitutionally unprotected. The Supreme Court also noted:

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.”

In United States v. Wilson, the U.S. Army Court of Military Review held that a service member who blew his nose on a flag was not protected under the First Amendment. The court specifically noted that the military judge “correctly balanced the needs of the government in promoting a disciplined military force with the rights of the appellant under the First Amendment.” The service member who blew his nose was in violation of a direct order to protect the flag. Here the military was not focused on the content of the speech. Therefore,

80 Goldman, 475 U.S. at 507 (outlining the military’s need to limit speech).
81 United States v. Priest, 45 C.M.R. 338, 344 (CMA 1972) (speech that weakens the military structure is unprotected).
82 Id.
83 Goldman, 475 U.S. at 507 (outlining the military’s need to limit speech).
84 United States v. Wilson, 33 M.J. 797, 798 (1991) (noting the government must balance and individual’s freedom of speech against military necessity to limit speech).
85 Id. at 800-01.
because of the military’s need to maintain discipline, any order against desecrating the flag
would most likely be upheld as valid, even in light of *Texas v. Johnson*. The service member
would likely be punished for the refusal to obey an order. Rarely would the military examine the
content of the order.

C. Uniform Code of Military Justice

The Constitution gives Congress the power to “raise and support armies; provide and
maintain an army; and provide for organizing and disciplining them.” Based on this authority,
Congress has enacted the UCMJ. The military’s jurisdiction under the UCMJ is over “active
duty personnel; [and] members of Reserve components not on active duty under some
circumstances.” The military utilizes the UCMJ to prosecute perceived speech violations.
Service members usually bring constitutional challenges to sentences dealing with speech
restrictions under the UCMJ.

Several articles of the UCMJ, including Article 134, Article 92, and Article 88, are
all commonly used to deal with speech violation issues. The broadest article typically used is
134, known as the “General Article.” Violations of this section include “[a]ll disorders and
neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature
to bring discredit upon the armed forces.” Specifics regarding the offenses that can be charged
under this Article are provided in the *Manual for Courts-Martial*. One relevant provision forbids

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92 Id. § 892.
93 Id. § 888.
94 Telephone Interview with LTC Paul Forshey, Judge Advocate General’s Office, Arizona National Guard Joint
disloyal statements, which may include either political or moral objections to governmental actions or policies.\textsuperscript{96}

Article 92 of the UCMJ is entitled “Failure to obey order or regulation.” This Article says

Any person subject to this chapter who--(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.\textsuperscript{97}

This is the article that embodies the common notions of failure to follow a direct order and dereliction of duty.

The final common article used is Article 88. This article specifically forbids officers from using “contemptuous words against the President, the Vice-President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth.”\textsuperscript{98} Article 88 does not prohibit criticism of the listed persons or bodies as long as the words are not “contemptuous.”\textsuperscript{99} However, because of the ambiguity “contemptuous,” most prosecutions under Article 92 are for failure to obey a commander’s order not to speak negatively about superiors.

The military can punish service members for exercising the right to speech via an online blog under Article 92 for violating a direct order to stop blogging or failing to register the blog. An officer can also be charged for a violation of Article 88 for contemptuous remarks made about the President on his blog. Service members can also be charged for violating Article 134 if

\textsuperscript{96} See \textit{Manual For Courts-Martial}, supra note 68, at Art. 134, para. 72(c).
\textsuperscript{97} 10 U.S.C.A. § 892 (West 2000).
\textsuperscript{98} 10 U.S.C.A. § 888 (West 2000).
a commander believes a service member’s blog is affecting the good order and discipline of the
unit.

D. Additional Regulations by the Department of Defense Concerning Blogging

The Department of Defense and the different service branches have promulgated a
variety of regulations that restrict the speech activities of service members. Some examples of
speech restriction are the blogging restrictions contained in General Vines’s policy, Unit and
Soldier Owned and Maintained Websites, and Air Force Instruction 33-129, prohibiting the
storage or transmission of obscene or offensive language or material on government computer
systems.

The restrictions on the blogging of military personnel generally stem from Department of
Defense (“DoD”) Directive 5230.9. The main purpose behind these regulations is to ensure an
orderly and politically disinterested military. It springs from a desire for a military which will
act based on orders rather than political motivations. These regulations prohibit a lot of
partisan political activity, such as speaking at any partisan political function on behalf of a
candidate. Furthermore, the DoD seeks to control the means of information distribution to
ensure its accuracy. The DoD Directive’s specific goal is to ensure

Accurate and timely information is made available to the public, the
Congress, and the news media to help the analysis and understanding of defense
strategy and national security issues.

Any official DoD information intended for public release that pertains to
military matters, national security issues, or subjects of significant concern to the

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100 See, e.g., Army Regulation 600-20, B-2-B-3 (2006) (examples of permissible & impermissible political
activities); see also Air Force Instruction 51-902, P1 (2005) (political activities allowed by members of the Air
Force).
101 Multi-National Corps-Iraq Policy #9, supra note 9.
104 Carr, supra note 99, at 336.
105 Army Regulation 600-20, supra note 100, at B-3.
Department of Defense shall be reviewed for clearance by appropriate security
review and public affairs offices prior to release.\textsuperscript{106} This is all intended to guarantee an organized and methodical military capable of functioning at the highest possible level. The less dissention or disagreement among the ranks, the more efficiently the military can function.\textsuperscript{107}

Commanders have a large amount of discretion in dealing with speech violations. Under Air Force Instruction 51-903, “commanders must preserve the service member’s right of expression, to the maximum extent possible, consistent with good order, discipline, and national security.”\textsuperscript{108} However, commanders also have “inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline.”\textsuperscript{109} Therefore, individual commanders must assess individual situations and act accordingly. Unfortunately, commanders regularly react as Specialist Buzzell’s did by trying to eliminate any blog that may be a problem. Commanders’ discretion is hardly ever exercised in favor the service member’s free speech, as commanders often point to security and discipline and shut down the blog in question.\textsuperscript{110}

The DoD has a substantial interest in ensuring the good order and discipline of the military. The regulations advance that interest by generally requiring members to obtain prior approval of their speech. The regulations thus create a prior restraint by giving a general order not to blog when a service member enters the theater of operation, unless a service member first obtains permission from a commander. The military argues it is concerned with preventing

\begin{flushleft}
\textsuperscript{106} DOD Directive 5230.9, \textit{supra} note 103, at 4.1-4.2.  \\
\textsuperscript{107} \textit{Greer v. Spock}, 424 U.S. 828, 843-44 (1976) (explaining how the military must not accept dissention in order to operate smoothly). \\
\textsuperscript{108} Air Force Instruction 51-903, P1.1 (1998). \\
\textsuperscript{109} \textit{Id.} at P1. \\
\textsuperscript{110} Bleyker, \textit{supra} note 19, at 412.
\end{flushleft}
disciplinary disruptions.\(^{111}\) It seems as though the purpose of every military regulation is to prevent disruptions. If this is true, then the First Amendment rights of service members can be summed up as: “Members can speak so long as what they say does not pose a clear, imminent, and substantial threat to the good order and discipline of the military.”\(^{112}\) The problem occurs with the definition of “good order and discipline.” Would the public approve if a service member was jailed for criticizing a commander’s tactics? Would this be considered a worthy violation of good order? Would the unit’s order actually be disrupted because of such speech? The military would argue that the violation is worthy of punishment because of a possibility of disruption.

**E. General Orders Given by Military Commanders**

Commanders can issue specific orders regulating the speech of their service members as evidenced in the above example concerning Air Force Instruction 51-903. In *Ethridge v. Hail,* the Air Force base commander issued an order prohibiting bumper stickers that “embarrass or disparage the Commander in Chief.”\(^{113}\) A civilian aircraft mechanic drove onto the base with a bumper sticker disparaging President Clinton. He challenged the order as violating his protected speech under the First Amendment.\(^{114}\) The court held that the base is a nonpublic forum\(^{115}\) where officials can impose speech regulations as long as the regulation is “reasonable and not an effort to suppress expression merely because the public officials oppose the speaker's view.”\(^{116}\)

\(^{111}\) *Parker,* 417 U.S. at 755 (military must prevent disruptions to good order and discipline).

\(^{112}\) Carr, *supra* note 99, at 341.

\(^{113}\) *Ethridge v. Hail,* 56 F.3d 1324, 1325 (11th Cir. 1995).

\(^{114}\) *Id.* at 1326.

\(^{115}\) *Id.* at 1328.

\(^{116}\) *Id.* at 1327 (quoting Perry Educ. Assoc. *v. Perry Local Educators' Assoc.*, 460 U.S. 37, 46 (1983)).
The order prohibiting the speech was upheld, and the mechanic could not express this view on base.\textsuperscript{117}

Under the current policy in Iraq, all service members have already been given a direct order concerning online speech.\textsuperscript{118} Specifically, service members are ordered not to blog unless first registering the blog with commanders who will monitor content.\textsuperscript{119} Individual unit commanders have the discretion whether to pursue punitive action against those disobeying direct orders.\textsuperscript{120} As we have seen, courts give deference to military officials in regulating speech because of the military’s unique role and its need to carry out missions. Service members do not have a high probability of overturning a commander’s initial decision. This is an undue burden placed on service members. The registration is a prior restraint because it discourages service members from blogging.

F. The Historical Relationship between the Press & Military

There has been a long tension between the military’s need to have operational security and the public’s right of access to the status of the military’s current operations. During the American Revolution, communications were limited to personal letters and official messages.\textsuperscript{121} The telegraph led to greater press coverage of the Civil War.\textsuperscript{122} As communications technology has changed over time, information on military operations has become more accessible. Thus, the regulation of this information becomes more complex.

\textsuperscript{117} Id.
\textsuperscript{118} Multi-National Corps-Iraq Policy #9, supra note 9.
\textsuperscript{119} Id.
\textsuperscript{120} See, e.g., Bleyker, supra note 19, at 411-13 (detailing how individual soldiers were punished by individual commanders for violations of direct orders).
In 1917, during the first World War, the “State, Navy, and War Departments established the Committee on Public Information to provide information and enforce censorship regulations.” The Espionage Act was then passed, which prohibited publication of information useful to the enemy or any interference with military operations or war production. The Sedition Act of 1918 followed imposing more guidelines on the flow of information about military operations, especially those critical of the government. During the Vietnamese War, however, the press had extraordinary access to military operations and there was little censorship of reporting. This led to an eventual conflict between the government and the military, putting the government and military at odds for years to come. The press criticized the government’s press treatment during military operations that followed, such as operations in Grenada and Columbia. Recently, reporters have been granted unparalleled access as they are “embedded” in military operations, going with actual units as they conduct their wartime missions. However, as the costs of covering wars increase, news organizations increasingly have turned to service member blogs. Milblogs offer insight into the battlefield unavailable to journalists. Milblogs are also cost effective and carry much more credibility than traditional forms of journalism. Rather than having the news biased by the journalist, the public is beginning to crave service members’ actual words. The public appears much more accepting of stories coming directly from service members. National media scandals, such as

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123 Lytle, supra note 60, at 595.
126 Lytle, supra note 60, at 596.
127 Jazayerli, supra note 121, at 136.
128 Lytle, supra note 60, at 597.
Dan Rather’s reporting of President Bush’s military record,\textsuperscript{131} have harmed the media’s credibility. Projects such as “The War Tapes” and the way the national media refers to items in milblogs, imply that the American public wants to hear the service members’ accounts directly from them.

The public’s ability to access virtual information is important. The ability of the public to access information was the reason behind the creation of the press clause.\textsuperscript{132} By limiting the public’s ability to consume the information, by limiting service members’ ability to blog, the military is effectively destroying the spirit behind the press clause. Service members aid the public in a pseudo-press role by providing information necessary to form valid and informed opinions. Milblogs can enhance the flow of virtual information regarding the war on terror by providing perspectives from service members that are traditionally underreported. This is information that is necessary for the public to hold the government accountable.

C. Analysis

I. Current Military Approach to Blogs

Debate is currently underway as exactly how to treat blogs. The ability to post a blog from the front lines and have it be accessible to anyone with an internet connection has created new operational security problems.\textsuperscript{133} In order to deal with these problems, the military has two options in the treatment of the new medium of service member blogs. The military could treat it as a new medium requiring new analysis and application of regulations—a policy of


exceptionalism.\textsuperscript{134} Or the military could treat the blogs like the one-to-one communications that have occurred in the past—a policy of unexceptionalism.\textsuperscript{135} The exceptionalist model better balances First Amendment rights against the need for national security in the milblog context.

A. Unexceptionalism

Currently, the military is taking an unexceptionalist view of milblogging. The military does a traditional analysis to determine violation and punishment based on the UCMJ. The main argument for the regulation of milblogs continues to be the need to control information that would possibly aid the enemy. The second argument the military relies on is the need to promote a high esprit de corps.\textsuperscript{136}

The unexceptionalist view of milblogging is that such blogs are analogous to forms of traditional media. However, the general public views blogs as being similar to diaries or journals.\textsuperscript{137} These forms have been traditionally free from military regulation. Others view milblogs as letters home. Rather than mail individual letters home, the letter is posted online, via the blog, so that the family may access it at their leisure.\textsuperscript{138} There are also others that view milblogging as more like journalism and reporting rather than a diary. The problem with this view for service members is that courts generally do not draw a First Amendment distinction between speech by the press and speech by the individual.\textsuperscript{139} A problem with simply viewing milblogs as online diaries is the ability of the service members’ “personal opinions” to reach

\textsuperscript{134} David G. Post, Against “Against Cyberanarchy.” 17 BERKELEY TECH. L.J. 1365, 1376 (2002).
\textsuperscript{135} Id.
\textsuperscript{137} MERRIAM-WEBSTER DICTIONARY, supra note 11 (definition of a blog).
\textsuperscript{138} See e.g. Milblogging.com, http://www.milblogging.com/ (examples of blogs to families).
\textsuperscript{139} Thomas v. Collins, 323 U.S. 516, 530 (1945) (the rights to freedom of speech and press though not identical are inseparable); In re Factor VIII or IX Concentrate Blood Products Litigation, 25 F.Supp.2d 837, 840 (N.D. Ill. 1998) (citing Liberty Lobby, Inc. v. Rees, 111 F.R.D. 19, 20 (D.D.C.1986)) (there is no distinction in protections given under the First Amendment to freedom of the press and freedom of speech).
many people. The public often views the opinions of service members as acting in an official capacity, which personal blogs are not. A service member expressing opinions in an official capacity is a violation of the UCMJ.\textsuperscript{140} There is also an issue of timing. Letters and journals are often read long after an event has occurred. This passage of time makes the information far less valuable to anyone who could use it. Instead of the “journal” or even the “letter” being limited to few people, it has the opportunity to be accessed by millions of people around the world in real time. Julia Mitchell argues that

Information in cyberspace has a unique permanent quality that differentiates it from more traditional sources like diaries or a press report. “Any discussion of the Internet as a ‘place’ must first deal with the phenomenon of cyberspace. Cyberspace is the virtual space created by the operation of the Internet, a network of computers that share information with each other.”\textsuperscript{141} In regulating milblogs, the military can pull down content that it deems sensitive, classified, or detrimental to military morale. Ironically, the information may remain in cyberspace indefinitely if someone else posts the information elsewhere.\textsuperscript{142}

Due to this possibility of permanence, the military has begun to classify a large amount of information. Though service members may inadvertently post some classified information, most strive to avoid it.\textsuperscript{143} This limits the amount of information available for service members to blog about.

Some milbloggers believe that this overclassification was specifically targeted against those expressing opinions critical of the government. Specialist Buzzell chose to stop his blogging rather than submit entries for approval before posting.\textsuperscript{144} As his blogs became more prominent, the DoD would likely become more involved.\textsuperscript{145} This would discourage all service

\textsuperscript{140} Mitchell, supra note 136, at 214.
\textsuperscript{141} Citation omitted.
\textsuperscript{142} Mitchell, supra note 136, at 214.
\textsuperscript{143} Whittle, supra note 51.
\textsuperscript{144} Lytle, supra note 60, at 603.
\textsuperscript{145} Mitchell, supra note 136, at 215.
members from blogging. \textsuperscript{146} Other service members have been informed that they could possibly be violating operational security guidelines. However, rather than risk punishment, they were offered the choice to take down their blog. \textsuperscript{147} The milbloggers themselves felt that the reason given, operational security, was not the real reason. Instead, the true reason they felt was expressing opinions critical of the military. \textsuperscript{148}

B. Exceptionalism

The military does have a substantial interest in maintaining operational security and keeping up the esprit de corp. However, the DoD’s current treatment of military blogs has been to view them as unexceptional. This approach can be supported for classified information and notification of family casualties. However, in regard to speech that simply may be critical of the military the DoD should be flexible. It should reexamine its policies and treatment of this new form of media. By allowing service members a chance to tell personal stories unfiltered, the DoD can positively influence public discussions by providing accurate facts previously available only from the mainstream media. \textsuperscript{149}

Julia Mitchell argues that the “unexceptionalist approach to controlling milblogs is also inconsistent with the military’s interest in maintaining operational security, because it fails to recognize the unique scale and permanence of information in cyberspace.” \textsuperscript{150} The proper analysis should be to treat milblogs as a new form of media requiring new scrutiny. There is already some history available that shows differential treatment of different forms of media. \textsuperscript{151}

There are similarities between the events that happen in real space and in cyberspace, but the

\begin{itemize}
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} Whittle, \textit{supra} note 51.
\item \textsuperscript{148} Mitchell, \textit{supra} note 136, at 215.
\item \textsuperscript{149} Robbins, \textit{supra} note 1, at 5.
\item \textsuperscript{150} Mitchell, \textit{supra} note 136, at 213.
\item \textsuperscript{151} \textit{Kovacs v. Cooper}, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (differential treatment of the mass media has become established First Amendment doctrine).
\end{itemize}
internet is significantly different. In real space it is relatively easy to monitor service member speech. A service member passing out flyers or speaking at a political rally is easy to notice. However, in cyberspace bloggers are often anonymous or use nicknames. This can pose a problem, but the military should not try to limit all speech by forcing registration or by overclassifying information. Requiring service members to register blogs would have a chilling effect on the bloggers themselves. The registration process would eliminate the anonymous option that some milbloggers find appealing. The process would also discourage certain service members from blogging simply through the intimidation of knowing for certain a higher ranking commander was reading the blog. Furthermore, registration could discourage any act of whistle blowing because a service member could be confronted for a blog and “letting the unit down.” Finally, blogs would be almost impossible to regulate because of the number of blogs that can hide the author’s identity. A better military policy is give service members the same amount of freedom afforded journalists and to prosecute only the worst offenders, people who post classified information.

However, the analogy that blogs are more akin to reporting rather than to diaries or journals is weak. While service members often blog about current events, their stories usually involve bias, personal perspective, and are not motivated by profit or paycheck. These milblogs are often not written for mass distribution like Specialist Buzzell’s was. The majority of milblogs are written for specific family with inside jokes and perspectives that would make them unappealing to the majority of readers. However, due to the constraints on time and use of the

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152 Post, supra note 134.
153 Milblogging.com, supra note 13.
154 Id.
155 Id.
internet, blogging is much more efficient for a service member.\footnote{Robbins, \textit{supra} note 1, at 2.} Often times internet use is limited during deployment, so service members must try to reach as many people as possible during a limited amount of time.\footnote{\textit{Id}.} Web-based email providers simply do not contain the space requirements to provide adequate communication resources to deployed service members. Blogs are much more efficient and dependable.

Some might argue that the military cannot afford to allow dissenting ideas in cyberspace. However, this argument fails to take into account word of mouth. Often, dissenters share their ideas with their fellow service members before writing a blog. The military is a close knit community, each member usually knowing the views and beliefs of other members in his or her individual unit.\footnote{Whittle, \textit{supra} note 51.} The view that dissent would harm the entire unit’s morale is an overestimation. Far more common is the case that service members will argue about their beliefs, but continue to act as a cohesive unit.\footnote{\textit{Id}.} Service members know who likes and dislikes policy. There often is one member in the unit who is known as the “complainer,” but this does not destroy the unit’s cohesiveness.\footnote{\textit{Id}.} The unit is as strong as the leaders make it. When the milblog is posted, members of the unit already know the nature, reasons, and beliefs within the post.\footnote{\textit{Id}.} Thus, the government’s argument about blogs weakening morale and lowering esprit de corps is waning.

Another argument for the military to adopt an exceptionalist view is that milblogs are not as pervasive as other forms of media. Whereas flyers, demonstrations, and protests involving service members views are traditionally regulated by the military, milblogs are just expressed on
the internet. The service member is not actively going out and passing out flyers. The internet
instead is organized in such a way that a reader would have to be specifically looking for those
views. The viewer would have to tell the browser where to go and what to look for. Only
someone who is actively seeking that particular type of blog would be likely to encounter it.
Some may argue that such dissenting views may be easy to find. However, there still exists an
affirmative act by a consumer to seek out the views. The fact that the views are provided by a
service member should not make a difference. Were the views being distributed by a journalist,
the military would have no problem, subject to the classification of the information. The military
should afford service members the same right to express personal opinions. Embedded
journalists are allowed to issue unfavorable reports.

There is also the issue that courts must address this new media form in order to avoid
blatant viewpoint discrimination. The internet should be viewed as a public forum to express a
person’s views. If the military regulates speech based on the content of views expressed in a
public forum, the military should not be given deference. Content regulation will have a
chilling effect on future speech by members of the military. If members of the military are afraid
to speak out, the country may never be able to avoid another incident like the one that occurred
at Abu Ghraib. Sergeant Joe Darby, the Abu Ghraib whistleblower, struggled when deciding
whether to provide the information to authorities. Sergeant Darby knew that his identity could

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the viewer must tell direct the internet browser to seek out desired information and websites).
163 VOA News Report, Weapons of Mass Destruction,
(last visited Jan. 4, 2009).
164 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that the government can regulate public forum
speech so long as it remains content neutral).
165 See, e.g., Ghosts of Abu Ghraib (Moxie Firecracker Films 2007).
166 60 Minutes: Exposing the Truth of Abu Ghraib (CBS television broadcast Dec. 10, 2006) (story available at
never be officially anonymous.\footnote{167} Had the military treated service member blogs the same as journalists’ speech, Sergeant Darby could have easily posted the pictures and reported the abuse anonymously as a whistleblower without fear of reprisal. However, this route was unavailable to him. Sergeant Darby was forced to come forward to officially hand over the infamous photos. As a result, members of his own unit viewed him as a “rat” and he feared for his life.\footnote{168} If Sergeant Darby did not have to fear UCMJ punishment, he could have submitted these anonymously via an online blog.

The military’s application of the UCMJ to milblogs amounts to content-based regulation of speech. A commander’s punishment and action would be based entirely on the content of the milblog. Therefore, the military should apply at least the same standards to service members’ blogs as applied to journalists’ speech in order to foster a greater exchange of ideas and avoid any future incidents like Abu Ghraib.

The military’s milblogging regulations are also a prior restraint and should be presumptively assumed to be unconstitutional. By forcing service members to register blogs before posting the military is discouraging the authors from blogging.\footnote{169} De facto prior restraints are distinct from regulations directing that a punishment follow for the banned activity, but “in some instances the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may . . . raise the same concerns which inform all of [the Supreme Court’s] prior restraint cases: the evils of state censorship and the unacceptable chilling of protected speech.”\footnote{170} Katherine Bleyker quoted a commander as saying “[t]he necessity of submitting to censorship will of itself deter many prospective authors from publishing their

\footnote{167 Id.}
\footnote{168 Id.}
\footnote{169 Multi-National Corps-Iraq Policy #9, supra note 9.}
\footnote{170 Bleyker, supra note 19, at 432-33.}
views,” especially given that “[c]ensors are apt to be hyper-cautious, particularly at lower military echelons.”

C. Amendments to the Uniform Code of Military Justice should address blogging, and the Supreme Court should apply strict scrutiny.

Courts should apply a strict scrutiny standard of review to all service members’ First Amendment cases. In the Pentagon Papers case the Court held that the government had not met its heavy burden of proof showing a valid national security concern that would justify enjoining publication of the Pentagon Papers. The Court implied that a valid security concern would overcome the presumption against prior restraints and required a strict scrutiny level of review. However, Justice Harlan suggested that deference should not be given to the Executive Branch and the military on all issues of national security. Such broad classification authority could lead to the vast increase in classification, such as what has happened in the last eight years. Such an increase in classification could result in lack of accountability and a government of secrecy. The judiciary should be careful in how much deference is given to the Executive Branch. The Court should apply a strict scrutiny standard of review to all service members’ First Amendment cases. The Court should require the Executive Branch to prove a valid security concern rather than give deference to the classification placed on the information.

Due to the deference courts give the military regarding the security concerns; commanders typically justify regulations on milbloggers with security reasons, like those cited in

[171] Id. at 433.


[173] Id.

[174] Id. at 757-58 (Harlan, J. dissenting) (noting the lack of attention towards national security and the rights of the Executive).

United States v. Progressive, Inc.\textsuperscript{176} That case concerned information that could aid America’s enemies. Providing pieces of information that could aid enemies is the basis for the mosaic information theory the government currently uses in classifying information. The mosaic theory of information, if applied to service members, would appear similar to this: “Though individual pieces of information service members give may not harm anything individually, collectively the information could be used against friendly forces.”\textsuperscript{177} As the mosaic theory is currently the standard for information review, it is extremely easy for the military to meet the low burden of proving a valid security concern. However, courts should not give deference to the military, but instead require the military to prove these concerns are valid in order to survive a strict scrutiny review.

The military would likely be able to survive many challenges under strict scrutiny. Some examples of the military being able to survive strict scrutiny are

If the military could show a valid national security concern stemming from terrorists’ piecemeal assembly of data gleaned from milblogs, this would arguably be a valid enough national security concern to survive a strict scrutiny analysis of its milblogging regulations. In addition to concerns about information compiled by terrorists, the military may also be able to show a valid national security concern by arguing that censorship of milblogs is necessary to maintain friendly foreign relations in a time of growing anti-American sentiment. Soldiers’ words may endanger relations with foreign allies, especially if an individual servicemember’s words are mistaken for official military policy.\textsuperscript{178}

These issues raised above focus on valid national security concerns and do not deal with dissent. Courts should not give deference to the military when dealing with issues of dissent amongst the ranks. While the military could overcome a challenge when dealing with a classified issue such as troop movements, it seems unlikely that the military could satisfy the strict scrutiny standard

\textsuperscript{176} United States v. Progressive, Inc., 467 F. Supp. 990, 993-94 (W.D. Wis. 1979) (explaining that data within the public domain is examined differently).

\textsuperscript{177} Mallia, supra note 41.

\textsuperscript{178} Bleyker, supra note 19, at 436-37.
in a situation where a milblogger was dissatisfied with the handling of the war or of a commander’s treatment of service members. The milblogger's words seem unlikely to prompt a revolt, but the words could undermine the discipline of other service members. General Colin Powell stated that

> We create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.  

The military argues that some speech undermines the esprit de corps. The military may, when combined with any national security concerns, be able to use the idea of disintegrating morale as way to survive the strict scrutiny standard. The fact remains that these dissenting ideas are already known in the military community regardless of blog regulation. The military must actually have a national security interest. Without this interest the military regulations requiring service members to register blogs should be treated as a prior restraint and held to be invalid. The requirement of registration does not equal permission to blog. Instead, by requiring service members to register, the military is asking service members to voluntarily create a watch list. Service members would likely be discouraged from blogging by knowing that commanders were closely monitoring blogs for dissenting opinions. By simply expressing dissenting ideas a service member should not be found to be in violation of military regulations without some form of government security interest beyond unit morale. While the analogy between service members and journalists is weak, the argument that reporters should not have more freedom to speak about personal experiences is strong. Service members should be afforded the same rights as journalists concerning the prior restraint of blogs.

179 Id. at 438-39.
180 Whittle, supra note 51.
Currently, the UCMJ contains many articles that are used to regulate milblogs. These articles penalize service members for behavior disrupting the good order and discipline of the military, for failing to obey any lawful order, and for using contemptuous words against the President or his administration.\textsuperscript{181} The military should update the UCMJ to include specific provisions regulating the content of blogs. These new regulations should clearly outline acceptable forms of information service members are and are not allowed to speak about. These regulations could be similar to those outlining political participation.\textsuperscript{182} By clearly defining what is and is not allowed, similar to the political participation regulation, the military would provide guidance for service members to follow and decrease the number of violations. Current military regulations regarding political participation allow service members to

\begin{quote}
Write a letter to the editor of a newspaper expressing the Soldier’s personal views on public issues or political candidates, if such action is not part of an organized letter-writing campaign or concerted solicitation of votes for or against a political party or partisan political cause or candidate.\textsuperscript{183}
\end{quote}

The updated regulation should include a codified ban on information deemed classified and dealing with family notification. The regulation should also provide service members with specific examples of what is not allowed, such as troop numbers and movements. The military should expressly state in the regulation a service member’s right to express opinions to the same extent as journalists. The time has come for the military to update existing regulations and include a forum for dissenting speech. A service member who posts an unfavorable blog regarding personal experiences during the war or unfavorable content regarding the President’s policies should not be regulated or shut down merely for voicing a dissenting opinion. The application of these new provisions should fall equally on service members who support the

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\textsuperscript{181} 10 U.S.C.A. § 888 (West 2000).
\textsuperscript{182} Army Regulation 600-20, \textit{supra} note 100, at B-2.
\textsuperscript{183} \textit{Id.}\n\end{flushright}
administration and those who voice dissenting opinions. As Major Robbins noted “the qualified support of milblogs is good policy.”\textsuperscript{184} Milblogs allow people to see service members in an unfiltered light, both good and bad, which can only help the military.

D. Conclusion

Milblogs are a new medium that have created new problems for the military. Courts must now strike a new balance between protecting service members’ First Amendment rights and ensuring the military’s operational security is protected. Milblogs serve important societal interests. They are a conduit for family and friends to find out about loved ones serving, and blogs give service members a place to be unabashedly honest about their everyday experiences. Milbloggers are contributing to the political dialogue and the journalistic story. Courts should view the military’s milblogging regulations as a prior restraint or, alternatively, subject them to review under the strict scrutiny standard. Either of these standards of review will allow true national security concerns to pass constitutional challenges.

The military must also update the UCMJ to specifically address the new challenges blogging has presented. Interests of the military, including protecting national security and discipline within the ranks, must be balanced with a service member’s right to tell his or her story and the public’s right to know the truth about the war. The government should not be allowed to restrict a service member’s rights to tell his story because it is unfavorable to the military. Those restrictions violate the service member's rights, but they also limit the public's access to information received directly from active participants in the war. The military should expand service members’ right to blog to the same level as journalists.

\textsuperscript{184} Robbins, \textit{supra} note 1, at 5.